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MICHAEL ROBAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5771

BERNARD FEINBERG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Keenan Printing Company 368

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No. ——

BERNARD FEINBERG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PRAYER

The petitioner, Bernard Feinberg, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit in this proceeding on September 12, 1974.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix "A" hereto. The opinion rendered by the District Court for the Northern District of Illinois, was published in 371 F. Supp. 1205 and appears in Appendix "C" hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 12, 1974. A timely petition for rehearing was denied on October 15, 1974, and this timely petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Because of the number and length of the statutes and other authorities involved, they are set forth in the Appendix attached hereto.

QUESTION PRESENTED

Does the Jencks Act prohibit pretrial disclosure to a defendant of the substance of his oral statements which will be relied upon by the Government to support the charges of the indictment?

STATEMENT OF THE CASE

The United States appealed to the Court of Appeals for the Seventh Circuit from an order, of District Judge Prentice Marshall of the Northern District of Illinois, suppressing evidence. The suppression order was entered because the Government refused to comply with the trial court's order requiring answers to certain particulars requested by the petitioner.

A Motion for Bill of Particulars pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure filed on petitioner's behalf requested, *inter alia*, the following:

> "5. Does the Government rely upon any oral statements of the defendant to support the charge in the several counts of the indictment?
>
> 6. If the answer to request No. 5 is in the affirmative, state with respect to each such statement, if there was more than one,
>
> "(a) The name and address of the person to whom the statement was made,
>
> "(b) The date on which the statement was made.
>
> * * * * * *
>
> "(d) The substance of the statement.
>
> * * * * * *
>
> "(g) Whether a written memorandum or verbatim transcript of the oral statement was made, and if so, whether the Government has possession of the memoranda or transcript."

The trial court ordered the Government to answer the particulars set forth above and the Government moved for reconsideration. The Motion for Reconsideration was

denied. The Government stated that it would not comply with the district court's order and would secure interlocutory review either by mandamus or pursuant to 18 U.S.C., Section 3731.

> "To facilitate review of these orders pursuant to 18 U.S.C., Section 3731 [the district court] exclude[d] from evidence and [denied] the Government the right to use at trial any statements made by the [petitioner] which are not disclosed pursuant to the views expressed herein." (App. "C", pp. 30A-31A).

In ruling on the validity of the trial court's order, the Court of Appeals for the Seventh Circuit affirmed the order in part and reversed in part. The Court of Appeals agreed that it was proper for the trial court to require the Government to provide the petitioner with particulars as to:

1. The name and address of the persons to whom the defendant made oral statements.
2. The dates on which the defendant made oral statements.
3. Whether or not a written memorandum or transcript of the oral statements was made, and, if so, whether the Government has possession of the memorandum or transcript.

The Court of Appeals reversed that part of the trial court's order which required the Government to provide the petitioner in advance of trial with the substance of his oral statements upon which the Government would rely to support the indictment at trial.

> "The suppression order is reversed insofar as it is based upon the Government's failure to furnish [petitioner] with the substance of his statements to prospective Government witnesses." (App. "A", p. 7A).

The United States has represented to counsel for petitioner that it will comply with that portion of the trial court's order which was affirmed by the Seventh Circuit. Accordingly, what is at issue here is whether or not the Court of Appeals erred in reversing the trial court's order requiring the Government to disclose to the petitioner the substance of his oral statements. It is noted that in entering the order the trial court stated:

> ". . . the defendant, however, is only entitled to his statements or the substance thereof. The substance of a Government witness' statement, unrelated to an alleged statement of the defendant, may be excised. Indeed, rather than display a pre-existing document, it is sufficient for these purposes that the Government, in narrative form, state the contents of defendant's alleged statements, the persons to whom the statements were made and the dates of the statements." (App. "C", pp. 13A-14A).[1]

The Court of Appeals grounded its ruling upon its view that:

> "the Jencks Act, incorporated by reference into Rule 16(b), prevents us from approving [the order] insofar as [it] require[s] the Government to produce before trial statements made by a [petitioner] to a prospective Government witness" (App. "A", p. 6A).

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1. It should also be noted that the trial court entered the same order in four cases. The Government chose to appeal in only two of those cases and complied with the order in the other two cases.

REASON FOR GRANTING THE WRIT

It Is Essential To The Administration Of Criminal Justice In The Federal Courts That Definitive Rules Be Enunciated Regarding The Propriety Of Pre-trial Disclosure To A Defendant Of The Substance Of His Oral Statements Which Will Be Relied Upon By The Government To Prove His Guilt At Trial.

A.

Broad Implications Of Question

Petitioner's request for a Bill of Particulars was couched in exactly the same language as that which was before this Court in *Will* v. *United States*, 389 U.S. 90, 93 n. 1. In *Will*, supra, the question which faced this Court was the propriety of a Writ of Mandamus issued by the Seventh Circuit to compel a district judge to vacate a pre-trial order in a criminal income tax case. This Court vacated the Writ, but did not reach the question of the validity of the trial court's order. The case at bar is a necessary extension of *Will* evoking a timely and compelling need for this Court to finally answer the underlying questions raised in *Will*.

While research has failed to reveal a foursquare conflict among the circuits now, as the trial court stated:

> "In arriving at this conclusion I am not without company. *United States* v. *Crisona*, 416 F. 2d 107, 114 (2d Cir. 1969); *United States* v. *Ahmad*, 53 F.R.D. 186 (M.D. Pa. 1971); see, also, *United States* v. *Bryant*, 142 U.S. App. D.C. 132, 439 F. 2d 642, 649 (1971) (statement made to "undercover" agent during course of crime); *United States* v. *Lubomski*, 277 F. Supp. 713 (N.D. Ill. 1967) (statement to I.R.S. agent during course of attempted bribery). In fact, the Bench

> Book for United States District Judges, published by the Federal Judicial Center, which I am encouraged to use, includes 'Discovery of all oral, written or recorded statements or memorandum of them made by defendant to investigating officers or third parties and in possession of the Government.' Par. 3(a), ch. 4.01.4 (emphasis added); see, also, Omnibus Pre-trial Proceedings by Hon. John W. Oliver, Western District of Missouri, 58 F. R. D. 270." (App. "C", p. 21A).

Two facets of the case are most striking. On the one hand district judges are encouraged in the interest of fairness, expeditiousness and the promotion of pleas to exercise their discretion toward granting pre-trial discovery to the defense. Yet the Circuit Court of Appeals erroneously states in its opinion that the district court has no discretion in this regard because the Jencks Act is a bar. In addition, the Court of Appeals by its decision condones a grossly unfair, discriminatory practice of the Government picking and choosing which defendants will receive vital information in advance of trial in order to defend themselves.

Unless the issue raised in this petition is conclusively resolved by this Court, every one of the thousands of criminal cases now pending and those which will be brought in the future in the federal courts will remain in an unsettled and confused state in this all-important area of pre-trial preparation.

While this Court does not favor interlocutory appeals in criminal cases, *Will* v. *United States*, 389 U.S. at 96, it is a certainty that pending resolution of this issue, a myriad of appeals will be forthcoming. Conflicts will develop between the various circuits requiring ultimate intervention by this Court. Failure to grant this Writ will only postpone the inevitable and will promote more appeals and delays.

B.

Scope Of Discretion Under Rule 7(f)

To deny or grant a bill of particulars and the extent thereof rests in the sound discretion of the trial court and trial court's decision will not be disturbed absent an abuse of discretion. *Wong Tai* v. *United States*, 273 U.S. 77. The historical purpose of granting a bill of particulars is to inform the defendant of the nature of the charge against him so as to enable him to prepare his defense and to avoid surprise at trial. *United States* v. *Martinez*, 466 F. 2d 679, 686 (5th Cir. 1972).

> "We do not understand the Government to argue that petitioner was in any sense without jurisdiction to order it to file a bill of particulars. Suffice it to note that Rule 7(f) of the Federal Rules of Criminal Procedure specifically empowers the trial court to direct the filing of a bill of particulars, and that federal trial courts have always had very broad discretion in ruling upon requests for such bills. *Will* v. *United States*, 389 U.S. 99 (Citations omitted).

The record conclusively shows that the trial court was extremely selective in granting discovery, particulars and disclosure of evidence as requested by the petitioner. The trial judge, being fully conversant with the record in the instant case and in anticipation of providing the petitioner a fair trial, ordered what he deemed to be necessary particulars. His order was a proper exercise of discretion.

> ". . . it is one thing to say that a trial court does not abuse its discretion when it denies [certain pre-trial] disclosure. It is another thing to say that district courts lack the authority to require such disclosure in the exercise of that discretion. When the question has thus been squarely put, the authority has been found to exist." *United States* v. *Jackson*, 374 F. Supp. 168, 174 (N.D. Ill., 1974). (Citations omitted).

C.

Jencks Act Question

A fair analysis of the order vis-a-vis the Jencks Act can only lead to the conclusion that there is no conflict between the particulars the Government was ordered to supply to the petitioner and the proscription of the Jencks Act. The Jencks Act permits a defendant to view and utilize for cross examination purposes a Government witness' "statement" related to the subject matter of his testimony.

The Government was not ordered to produce memoranda or transcripts, i.e., the actual 3500 statement, or to reproduce verbatim portions thereof. The trial court merely ordered the Government to inform the petitioner of the *substance of his oral statements* — they were not ordered to produce the statements of prospective witnesses. All that the petitioner sought under Rule 7(f), Federal Rules of Criminal Procedure, and that which the trial court ordered the Government to produce, was factual information which would apprise him of the substance and circumstances of his oral statements upon which the Government relies to support the indictment.

It is respectfully submitted that the Court of Appeals erred in holding that the Jencks Act bars disclosure to the petitioner of the substance of oral statements made by him. The cases relied upon by by the Court of Appeals[2]

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2. *United States* v. *Wilkerson*, 456 F. 2d 57, 61 (6th Cir., 1972); *United States* v. *Kenny*, 462 F. 2d 1205, 1212 (3rd Cir. 1972); *United States* v. *Dorfman*, 53 F.R.D. 477, 479 (S.D. N.Y. 1971), aff'd 470 F. 2d 246 (2d Cir. 1972) (App. "A", pp. 4A-5A).

are inapposite to the facts in the case at bar. In all of those cases what was sought by the defendants and denied by the respective Courts on Jencks Act grounds were 3500 statements. Petitioner in the case at bar clearly was not seeking 3500 statements.

The trial court properly recognized that in "intent crimes"[3] guilt or innocence could well turn on the credibility the jury ascribes to statements of the petitioner. Thus, in the exercise of sound judicial discretion the trial court deemed it necessary that the petitioner in his pretrial preparation be apprised of the substance of his alleged oral statements in order to properly prepare for and defend his case.[4]

The Jencks Act bar can be applied only to statements as defined in Section 3500(e). That subsection provides:

> "(e) The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> (2) a stenographic, mechanical, electrical, or oth-

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3. Petitioner is charged with violations of 18 U.S.C. Section 1341 by use of the mails in furtherance of a scheme to defraud the citizens of Cook County, Illinois of taxes on certain real properties located in the County. The indictment was returned in May of 1973 and covered events occurring in late 1971 and early 1972.

4. "The Government [stated] in open court that its case against [petitioner] rests largely on statements allegedly made by him." (App. "C", p. 13A).

> er recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." 18 U.S.C. Section 3500(e).

The "statements" defined in this subsection are the written documents and audio reproductions that are covered in the proscription of Section 3500(a). The substance of oral statements of a petitioner do not fall within this definition.

An interviewee's version of oral statements made by the petitioner are only a part[5] of the 3500 statement (assuming that person is a witness and testifies) and, depending upon the individual 3500 statement, could be a minor part. The fact that the petitioner's oral statements are recorded or transcribed by a Government agent interviewing the person reciting the alleged statements makes them nonetheless the petitioner's oral statements. Hence, there is no conflict between the District Court's Order and the Jencks Act.

Moreover, Rule 16(b) is not a bar to compliance with the trial court's order and reliance upon that rule is misplaced. The Court of Appeals states in its Opinion on page 3:

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5. Experience tells us that 3500 statements typically contain a great deal more than the interviewees' version of oral statements made to him by the defendant. What is likely to be contained in a composite of typical 3500 statements is the interviewees': (a) Observations of occurrences; (b) Recitations of conversations with persons other than the defendant; (c) Recitations of his actions; (d) Recitations of actions of others; (e) Conclusions; and (f) Opinions.

> "Rule 16 does not authorize the *discovery* or *inspection* . . ." (App. "A", p. 4A) (Emphasis added).

The trial court did not order *discovery* or *inspection* of 3500 statements.

The Seventh Circuit also stated that:

> "Prohibiting the disclosure ordered here until the witness has testified at trial also protects the integrity of the Government's evidence." (App. "A", p. 5A).

The integrity of the Government's evidence would not be affected by the disclosure which is sought here. *Will* v. *United States*, supra, clearly holds that this type of rationale should not be relied upon absent a showing of possible prejudice to the Government. There was no showing of prejudice in the case at bar, because none could be made.

As it now stands, the petitioner will be apprised in advance of trial who it is that the Government says he made oral statements to.[6] If he is, as he should be, made aware of the substance of his alleged oral statements, how can it possibly affect the integrity of the Government's case; particularly, if the petitioner does not take the stand. At

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6. This Honorable Court should recognize what is unfortunately a fact of life for defense counsel in most cases; that is, a tendency on the part of most potential Government witnesses to refuse to be interviewed by the defense prior to trial. In the unlikely event a person would agree to be interviewed, the probability of accurate recollection is minimal because of the long lapse of time. Hence mere knowledge of the identity of potential Government witnesses is, for all practical purposes, meaningless.

best, the petitioner will either deny or attempt to explain the meaning and circumstances of the oral statements. This is no more than he could do upon hearing the oral statements in the actual trial.

What he could not do, however, is conduct a meaningful investigation prior to trial so as to enable him to adequately prepare his defense. Examples will serve to illustrate cogent reasons which mandate the granting of the Writ.

By virtue of being advised prior to trial of the substance of his oral statements, petitioner's recollection would be refreshed so as to enable him to effectively assist defense counsel in preparing for the trial. Absent reasonably advance knowledge of his alleged oral statements, sudden recollection at trial by petitioner, if such recollection occurs at all, may well be too late to obtain evidence necessary to rebut the Government's allegations.

Assuming arguendo that petitioner made the same statement to two or more persons at the same time, those persons' versions of the statement could well differ. Should the Government choose to call only that person(s) as a witness whose testimony is compatible with the prosecution theory and not call the other person(s), the petitioner would be manifestly prejudiced if he did not have sufficient time to locate the other person(s) or otherwise preserve his testimony.

Disclosure of the substance of petitioner's oral statements which will be relied upon by the Government to support the indictment is necessary to insure that petitioner will receive a fair trial. There is no need for more examples or the expounding of platitudes to bring about the realization that the test of a fair trial is much broader

than what does or does not occur during the actual trial. The right and ability to fairly prepare for trial is at least on an equal plane with the right to fairly try a case. This is inherent in our concept of substantial justice. The trial court thus recognized its responsibility to do substantial justice by ordering the Government to inform the petitioner of facts so as to enable him to prepare his defense and avoid surprise at trial.

Nothing in Section 3500 or Rule 16(b) prohibits Government compliance with the trial court's order. On the contrary, basic fairness dictates that this Honorable Court hold that the Government must comply with the trial court's order.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 74-1253 and 74-1254

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
BERNARD FEINBERG,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
JOHN C. THOMPSON,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73 CR 370
No. 73 CR 646

PRENTICE H. MARSHALL,
Judge.

Heard June 7, 1974—Decided September 12, 1974

Before CLARK, *Associate Justice*,[1] CUMMINGS, *Circuit Judge*, and BEAMER, *Chief District Judge*.[2]

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1. The Honorable Tom C. Clark, Associate Justice of the Supreme Court of the United States (Retired), is sitting by designation.

2. Chief Judge George N. Beamer of the Northern District of Indiana is sitting by designation.

PER CURIAM. These consolidated cases have a somewhat different procedural origin. In *Feinberg*, pursuant to a motion for a Bill of Particulars under Rule 7(f) of the Federal Rules of Criminal Procedure, the district judge ordered the Government to respond to the following (see 371 F. Supp. at 1208):

1. Whether a written memorandum or verbatim transcript of oral statements made by the defendant to Government agents or third persons exists;
2. Whether the Government has possession of existing memoranda or transcripts;
3. The name and address of the persons to whom the defendant made oral statements;
4. The date on which the defendant made oral statements; and
5. The substance of oral statements by the defendant.

The first four matters are not within the prohibition of the Jencks Act (18 U.S.C. § 3500), so that the district judge acted within his discretion in ordering the answers. See *Will* v. *United States*, 389 U.S. 90;[3] *United States* v. *Rinaudo*, 422 F. 2d 817, 818 (7th Cir. 1970). In fact, the Government's brief only challenges the order insofar as it requires the Government to produce the statements (or the substance thereof) made by the defendant to prospec-

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3. In the *Will* case, the district judge refused to order the Government to reveal the substance of statements made by defendant to private parties. 389 U.S. at 92, n. 1.

tive government witnesses.[4] On the Government's motion to reconsider, the district court treated defendant's request as one for discovery under Rule 16(a) of the Federal Rules of Criminal Procedure and again held that such statements were producible.

In *Thompson* the court granted defendant's motion for discovery under Rule 16(a) insofar as the defendant sought to inspect and copy statements made by him that were contained in statements made by third parties, within the possession, custody or control of the Government. Because of the restrictions of the Jencks Act, we reverse as to such statements in both cases.

In pertinent part, Rule 16(a)(1) permits the district court to order the Government to permit a defendant to inspect and copy or photograph any relevant "written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government * * *." The Advisory Committee's notes make it plain that the words "to the attorney for the government" modify the phrase "the ex-

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4. After the oral argument, the Government referred us to Part II of its brief in the pending case of *United States* v. *Jackson*, No. 74-1488 (7th Cir.), which contends that the Government need not produce a pretrial list of its witnesses to defendants. Judge Marshall did not require the Government to produce such a list but only a list of persons to whom Feinberg made oral statements. This is comparable to the procedure permitted in *Will*. See 389 U.S. at 92, n. 1 and 100-101. Therefore, we need not reexamine the witness list problem here.

istence of which is known, or by the exercise of due diligence may become known." 8 Moore's Federal Practice, par. 16.01[3] p. 16-5 (2d ed. 1973). Therefore, as held below (371 F. Supp. at 1216), Rule 16(a)(1) is not limited to statements of the defendant made to agents of the Government. *United States* v. *Baker*, 262 F. Supp. 657, 671-672 (D.D.C. 1966); Moore, *supra*, par. 16.01[1] p. 16-38.

On the other hand, Rule 16(b) provides in pertinent part that Rule 16 does not authorize the discovery or inspection "of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in" the Jencks Act. Accordingly, it is necessary to refer to the Jencks Act to see if it permits the discovery of defendants' statements made to prospective government witnesses (371 F. Supp. at 1212).

In pertinent part, the Jencks Act provides (18 U.S.C. § 3500(a)):

> "In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case."

While we sympathize with broadened discovery in criminal cases, the foregoing statutory provision prescribes pre-trial discovery of statements of government witnesses, including those parts which relate conversations of the defendant. Such statements are not producible under 18 U.S.C. § 3500(b) until after a witness called by the United States has testified on a subject matter related to the statements. *United States* v. *Wilkerson*, 456 F. 2d 57, 61

(6th Cir. 1972), cert. den., 408 U.S. 926; *United States* v. *Kenny*, 462 F. 2d 1205, 1212 (3d Cir. 1972), cert. den. *sub nom. Krupke* v. *United States*, 409 U.S. 914; *United States* v. *Dorfman*, 53 F.R.D. 477, 479 (S.D. N.Y. 1971), affirmed, 470 F. 2d 246 (2d Cir. 1972). The Commentary of the American Bar Association's Advisory Committee on Pretrial Proceedings does not discuss the question, although its report acknowledges other hurdles presented by the Jencks Act. See ABA Standards Relating to Discovery and Procedure before Trial (1969), pp. 58-59, 62. *United States* v. *Duffy*, 54 F.R.D. 549 (N.D. Ill. 1972), dealt with a quite different, though possibly overlapping, discovery request, so that it does not support defendants.

As noted in *Dorfman*, in excluding pre-trial discovery of oral statements made by defendant to prospective government witnesses, Congress was endeavoring to protect the security of those witnesses. Prohibiting the disclosure ordered here until the witness has testified at trial also protects the integrity of the Government's evidence. Probably these same factors motivated the draftsmen of proposed Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure (presently scheduled to go into effect on August 1, 1975) to limit pre-trial discovery to the "substance of any oral statement which the government intends to offer in evidence at the trial *made by the defendant* whether before or after arrest in response to interrogation by any person then known to the defendant *to be a government agent*" (emphasis supplied) (62 F.R.D. 304-305). Since the proposed rule was intended to give "greater discovery" than before (62 F.R.D. 308), it strongly reinforces our holding that the present rule does not permit the discovery sought.

As the district judge intimated, any statement of the defendant in the Government's possession involves at least an implicit statement of someone else — if only the stenographer — that the defendant made the statement attributed to him. 371 F. Supp. 1213. This does not mean that we are overruling past decisions permitting the defendant to discover his own statements. There may be line-drawing problems, but the guiding principle is fairly clear. A defendant's statement is discoverable when it or an account thereof is "written or recorded" (Rule 16 (a)(1)) promptly after the statement is made. Where a written record is contemplated when the statement is made and an account of the statement is eventually written down, the writing should be discoverable even if there was some delay. But where the statement is originally memorialized only in the recollection of a witness, then it is not discoverable even if that witness' recollection is eventually written or recorded. Unlike the district judge, we accept the Government's rationale that ordinarily "it is 'manifestly impossible' to reveal the contents and circumstances of a defendant's statement without revealing the contents of the prospective witness' statement which is forbidden by Section 3500" (371 F. Supp. at 1213).

In his opinion below, Judge Marshall has assembled powerful arguments in favor of his discovery orders. See 371 F. Supp. at 1205. Nevertheless, the language of the Jencks Act, incorporated by reference into Rule 16(b), prevents us from approving those orders insofar as they require the Government to produce before trial statements made by a defendant to a prospective government witness. The relief sought by the defendants must come from Congressional revisions of the Jencks Act or amendments to proposed Rule 16(a)(1)(A) to make it coextensive with

the ABA Standards, *supra*, whose Section 2.1(a)(ii) provides for the disclosure of "any written or recorded statements and the substance of any oral statements made by the accused * * *." We would be able to adopt this standard in the absence of the Jencks Act bar.

In *Feinberg*, the suppression order is reversed insofar as it is based on the Government's failure to furnish defendant with the substance of his statements to prospective government witnesses. In *Thompson*, the suppression order is reversed insofar as it is based on the Government's failure to produce before trial those parts of statements of prospective government witnesses containing statements of the defendant.

Affirmed in part; reversed in part; each party to bear its own costs.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

October 15, 1974

Before

Hon. TOM C. CLARK, Associate Justice
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. GEORGE N. BEAMER, Chief District Judge

UNITED STATES OF AMERICA, Plaintiff-Appellant, No. 74-1253 vs. BERNARD FEINBERG, Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division (73 370 CR)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be, and the same is hereby, DENIED.

APPENDIX "C"

UNITED STATES of America

v.

Bernard FEINBERG.

UNITED STATES of America

v.

John C. THOMPSON.

UNITED STATES of America

v.

Louis A. KOPPLE.

UNITED STATES of America

v.

Frank J. KUTA.

Nos. 73 CR 370, 73 CR 646, 73 CR 778, 74 CR 22.
United States District Court,
N. D. Illinois, E. D.

March 1, 1974.

MEMORANDUM OPINION

MARSHALL, District Judge.

Three of these four criminal cases are pending on motions by the Government for reconsideration of orders

granting pre-trial discovery of statements made by the defendants. The fourth case is pending on defendant's motion for similar discovery. The challenged orders and the pending motion were entered or made pursuant to the provisions of either Rule 7(f) or 16(a) of the Federal Rules of Criminal Procedure. In each case the Government asserts that pre-trial discovery of statements made by the defendant to persons other than government agents is not authorized by the Rules and violates the restrictions on pre-trial discovery prescribed by the Jencks Act (18 U.S.C. § 3500(a)) and authoritative decisions interpreting the Act (including decisions of the Court of Appeals for the Seventh Circuit). The Government has stated that if the orders are not modified, it will seek interlocutory review by way of mandamus or pursuant to 18 U.S.C. § 3731. Because of the commonality of the contentions raised by the Government and the importance of those contentions to the administration of criminal justice in the federal courts, I have considered the cases together. Brief descriptions of the cases and the particular discovery granted or sought are germane to the contested issues.

In No. 73 CR 370, defendant Bernard Feinberg is charged with violations of 18 U.S.C. § 1341 by use of the mails in furtherance of a scheme to defraud the citizens of Cook County, Illinois, of taxes on certain real properties located in the county. According to the allegations of the indictment, Feinberg, who is the owner of the subject properties, falsely represented or caused to be represented to county taxing authorities that the properties were vacant when he knew they were improved and occupied by tenants, and submitted to the taxing authorities City of Chicago building permits regarding the prop-

erties which he knew had been altered or modified after their issuance, all to the end that he fraudulently obtained substantial reductions in the assessed valuation of the properties which, in turn, reduced the ad valorem taxes levied against them. The indictment proceeds to allege use of the mails in furtherance of the scheme.

In No. 73 CR 646, the defendant John C. Thompson, former Chicago Director of the Equal Opportunity Division of the United States Department of Housing and Urban Development, is charged with violating 18 U.S.C. § 201(c)(1) by soliciting and accepting a $3,000 bribe from one Ross in connection with Thompson's official approval of affirmative action programs submitted with applications for Federal Housing Administration loan insurance for three housing projects.

In No. 73 CR 778, defendant Louis A. Kopple is charged with violations of 21 U.S.C. § 841(a)(1) by the distribution of large quantities of amphetamines and barbiturates. Although not alleged in the indictment, it is undisputed that Kopple is a licensed physician of fifty years experience. Furthermore, his counsel has represented to the court that Kopple is 77 years old and shows marked signs of beginning senility and has difficulty in recalling any of the transactions alleged in the indictment.

In 74 CR 22 (superseding 73 CR 490), defendant Frank J. Kuta is charged in a multi-count indictment with the obstruction of commerce by means of extortion in violation of 18 U.S.C. § 1951, mail fraud in violation of 18 U.S.C. § 1341 and the filing of false income tax returns in violation of 26 U.S.C. § 7206(1). Kuta was an alderman of the 23rd Ward of the City of Chicago and as

such a member of the Chicago City Council. Stripped of its verbiage the indictment alleges that Kuta extorted payments from three persons named, Gaw, Vanchieri and Allen, in respect to amendments to the Chicago Zoning Ordinance as it applied to the properties which they desired to develop. Although not alleged in the indictment, it is undisputed that Kuta is an attorney licensed to practice law in Illinois.

The cases have a common thread which, in my judgment, supports the discretionary relief I have granted. Unlike criminal cases in which there is a dispute as to either the conduct or the identity of the accused, it is fair to anticipate here that the Government's proof will readily establish that the defendants performed some or all of the acts with which they are charged: Feinberg sought and obtained tax reductions; Thompson received a payment from Ross; Kopple possessed and distributed drugs; and Kuta received payments from Gaw, Vanchieri and Allen. The transactions are not, however, unlawful in and of themselves. The gravamen of each charge is the alleged purpose, knowledge or intent of each defendant at the time of his alleged conduct.

In these circumstances, we can assume that the Government will seek to prove the defendants' alleged unlawful states of mind by resort to statements made by the defendants before, during or after the subject transactions. Furthermore, it is not unlikely that the statements will be attributed to the defendants by persons who participated in those transactions. Of course, the requisite state of mind can, in certain circumstances, be inferred from the conduct itself. But if statements by the defendants reflecting their states of mind are available to the Gov-

ernment, we know they will be used, and they will constitute a significant part of the Government's case.[1]

It was in light of the foregoing that defendant Feinberg (charged with mail fraud regarding real estate taxes) sought, by way of a motion for bill of particulars pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure, the following:

> "5. Does the Government rely upon any oral statements of the defendant to support the charge in the several counts of the indictment?
>
> "6. If the answer to request No. 5 is in the affirmative, state with respect to each such statement, if there was more than one,
>
> "(a) The name and address of the person to whom the statement was made,
>
> "(b) The date on which the statement was made,
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> * * * * * * *
>
> "(d) The substance of the statement,
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> * * * * * * *
>
> "(g) Whether a written memorandum or verbatim transcript of the oral statement was made, and, if so, whether the Government has possession of the memoranda or transcript."

I granted the motion. Thereafter, upon the Government's motion to reconsider, I treated Feinberg's motion as one for discovery under Rule 16 making clear that "the defendant, however, is only entitled to his statements or

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1. In 73 CR 370 the Government has stated in open court that its case against Feinberg rests largely on statements allegedly made by him.

the substance thereof. The substance of a Government witness' statement, unrelated to an alleged statement of the defendant, may be excised. Indeed, rather than display a pre-existing document, it is sufficient for these purposes that the Government, in narrative form, state the contents of defendant's alleged statements, the persons to whom the statements were made and the date of the statements." The Government has again requested reconsideration of my order in view of its stated purpose to refuse to comply therewith provoking either a proceeding in mandamus or an interlocutory appeal pursuant to 18 U.S.C. § 3731. Feinberg has also requested, for reasons hereinafter stated, that I return to a Rule 7(f) bill of particulars approach to his request rather than a motion for discovery pursuant to Rule 16(a).

Thompson (charged with accepting a bribe regarding approval of an F.H.A. affirmative action program), by a motion for discovery and inspection pursuant to Rule 16, requested an order that he be permitted "to inspect and copy, or photograph, any and all recorded or written statements . . . made by any persons having knowledge of the facts . . . within the possession, custody or control of the Government. . . ." I denied that request except "to the extent that statements of other persons [contained] statements of the defendant." The Government has moved that I reconsider that order.

Kopple (charged with unlawful distribution of drugs) has moved for discovery pursuant to Rule 16 of "any memoranda, transcripts or writings in Government possession containing inculpating relevant statements, admissions or confessions purportedly made by defendant during the transactions alleged in Counts 1 through 7 of this indictment." In the motion Kopple states, "The defend-

ant seeks to learn what it is he is supposed to have said to government agents or third parties during the transactions alleged in this indictment. It is only in that way that he can begin to prepare a defense against the charges of the indictment." In addition, Kopple has pending a motion for bill of particulars pursuant to Rule 7(f) in which he requests, "What are the inculpating relevant statements, admissions or confessions purportedly made by the defendant during the transactions alleged in Counts 1 through 7 of this indictment?" In support of this motion defendant states that he is "a 77-year-old physician, . . . unable to remember his whereabouts and activities on the dates alleged in this indictment."

Kuta (charged with extortion, etc., regarding Chicago zoning ordinance amendments) sought a bill of particulars which was granted, calling for the Government to "state any act, declaration or statement of the defendant which induced, provoked, stimulated or generated the belief and fear of Gaw as alleged in Paragraph 10 . . . [and] the belief and fear of Vanchieri and Allen respectively as alleged in Paragraph 2 of Counts 2 and 3." The Government has moved for reconsideration of that order.

From the foregoing, I trust this consistent attitude emerges: in cases the likes of the four presented here, I may, in the exercise of the discretion granted me by either Rule 7(f) or Rule 16(a), order the Government to disclose to the defendant statements made by the defendant to any person which the Government will use against the defendant at trial.

The Government's disagreement is equally consistent: it asserts that neither Rule 7(f) nor 16(a) authorizes such disclosure and that 18 U.S.C. § 3500 forbids it. In

view of the Government's consistent opposition, it is unimportant whether the disclosure is ordered under Rule 7(f) or 16(a). As counsel for the Government observes in *Kuta*:

> ". . . the fact that the requests were made pursuant to Rule 7 [rather than Rule 16] is of no moment. . . . We cannot, . . . change the essential nature of things . . . [A]s Mr. Justice Holmes so wisely observed: 'We must think things not words or at least, we must constantly translate our words into facts for which they stand, if we are to keep the real and true.' Holmes Law in Science and Science in Law, 12 Harv. L. Rev. 443, 460 (1899)."

While the Rule 7(f) bill of particulars route for disclosure of this type of information has withstood a mandamus challenge in Will v. United States, 389 U.S. 90, 88 S. Ct. 269, 19 L. Ed. 2d 305 (1967),[2] in an area as vital to the administration of criminal justice as pre-trial discovery, hopefully we have matured beyond the point that we would grant one defendant disclosure of his statements because his lawyer sought it by way of a motion for a "bill of particulars" but deny it to another whose lawyer sought it by way of a motion for "discovery."

There is one more common thread to these cases which deserves comment before turning to the interplay of the

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2. Defendant Feinberg's request for a bill of particulars was couched in precisely the language used in *Will*. Thus it is understandable that Feinberg's counsel was distressed when, on my earlier reconsideration of the bill of particulars, I concluded that I would treat the motion as one for discovery under Rule 16(a).

discovery rules and Section 3500. It is varyingly said in briefs submitted to me by different Government counsel that the orders will require the disclosure of "virtually our entire case." The statement seems to carry with it the suggestion that pre-trial disclosure is undesirable.

Despite professional protestations to the contrary, there does remain a good bit of "sporting" and "tactics" and affection for the "weapon of surprise" in the trial of lawsuits, both civil and criminal. If, however, a trial is a search for the truth (albeit an imperfect search) pre-trial disclosure in both civil and criminal cases is to be encouraged. In civil cases, we have become so insistent in this regard that the parties cannot proceed to trial until the court is convinced that there has been complete disclosure of witnesses, anticipated testimony, exhibits, expert qualifications and reports, damages, etc., all culminating in comprehensive stipulations, agreed statements and pre-trial orders to the end that the trial (if there is one) is no longer a recreation of the event, but instead a recreation of the discovery. In the words of my colleague, Judge Hubert Will, we do these things to the end that we may attain a "higher quality of justice." Similar motivations should be present in criminal cases and they are if my reading of contemporary literature is at all perceptive. See, e.g., ABA Standards for Criminal Justice, Discovery and Procedure Before Trial (App'd Dr. 1970); J. Zagel and Z. Carr, State Criminal Discovery and the New Illinois Rules, 1971 Ill. L. F. 557.

Pre-trial discovery of relevant information and the sources thereof should be as complete in criminal cases as it is in civil cases. Disclosure should be made by both sides, subject to reasonable legislative regulation, to protective orders where the need for protection is demon-

strated, and to the Constitutional right of the accused to be free from compelled *testimonial* incrimination. In this way criminal cases, like civil, will be subject to knowing and intelligent pre-trial disposition by plea or dismissal; unnecessary delays during the course of trial while counsel examine exhibits, statements, transcripts and the like will be avoided; and the problems of *Bruton*,[a] *Miller*,[b] *Napue*[c] and *Brady*[d] will be obviated.

I turn, now, to the construction and application of the Rules and Section 3500 to the cases at hand.

THE SCOPE OF THE RULES

Rule 7(f) of the Federal Rules of Criminal Procedure provides, in material part, "The Court may direct the filing of a bill of particulars . . ." Rule 16, which is the head of the authority to grant discovery, provides in material part:

> "(a) *Defendant's Statements*: . . . Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements . . . made by the defendant, . . . within the possession, custody or control of the government, the existence of which is known, or by the

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a. Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

b. Miller v. Pate, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967).

c. Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959).

d. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

exercise of due diligence may become known, to the attorney for the government, . . .

"(b) . . . Except as provided in subdivision (a)(2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.

* * * * *

"(d) . . . *Manner of Discovery and Inspection.* An order of the court granting relief under this rule shall specify the . . . manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

"(e) *Protective Orders.* Upon a sufficient showing, the court may . . . order that the discovery or inspection be . . . restricted . . . or make such other order as is appropriate. . . ."

The Government's initial contention is that, apart from the restrictions of Section 3500, the Rules do not contemplate disclosure of statements made by a defendant to persons other than agents of the Government. Thus, the Government would read Rule 16(a) as if it were written: ". . . the court may . . . permit the defendant to inspect . . . written or recorded statements . . . made by the defendant [to agents of the Government]. . . ." I am unable to accept such a narrow reading of 16(a) for a number of reasons.

Paramount is the fact that the Rule simply does not contain the restrictive language the Government would interpolate into it. If such had been the intent of either the draftsmen or of the Supreme Court in its adoption of 16(a), suitable language would have been used to that end. Indeed, such language was used in drafting that portion of 16(b) which conformed the Rule to Section 3500. Its inclusion there and omission from 16(a) can only be regarded as a clear manifestation that the statements made by the defendant which are discoverable under 16(a) are not limited to statements made to agents of the Government.

Furthermore, resort to the Notes of the Advisory Committee to the 1966 Amendment (which resulted in the language in question) demonstrates that such a restriction was not intended. The Notes make no suggestion of such a restriction. They relieve the defendant of any obligation to designate particular statements "because he may not always be aware that his statements . . . are being recorded." And in support of the conclusion that the proposed amendment was in line with "the law in a number of states," the Committee cited, inter alia, Cash v. Superior Court, 53 Cal. 2d 72, 346 P. 2d 407 (1959), which involved the disclosure of statements made by a defendant to a person not known to him to be an agent of the prosecution.

Finally such an interpretation would create the anomaly of potential disclosure of a confession to a Government agent but not to a non-agent (see, United States v. Wilkerson, 456 F. 2d 57, 61 (6th Cir. 1972) as well as factual inquiries into who was or was not an agent which would be totally immaterial to the evidentiary con-

tent of the statement or confession. See, United States v. Bryant, 142 U.S. App. D.C. 132, 439 F. 2d 642, 649 (1971).

Thus, it is my conclusion that the Rule should be given what I regard as its literal interpretation: disclosure may be ordered of statements made by a defendant regardless of to whom they were made. In arriving at this conclusion I am not without company. United States v. Crisona, 416 F. 2d 107, 114 (2d Cir. 1969); United States v. Ahmad, 53 F. R.D. 186 (M.D. Pa. 1971); see, also, United States v. Bryant, 142 U.S. App. D.C. 132, 439 F. 2d 642, 649 (1971) (statement made to "undercover" agent during course of crime); United States v. Lubomski, 277 F. Supp. 713 (N.D. Ill. 1967) (statement to I.R.S. agent during course of attempted bribery). In fact, the Bench Book for United States District Judges, published by the Federal Judicial Center, which I am encouraged to use, includes "*Discovery* of all oral, written or recorded statements or memorandum of them made by defendant to investigating officers or *third parties* and in possession of the Government." Par. 3(a), ch. 4.01.4 (emphasis added); see, also, Omnibus Pretrial Proceedings by Hon. John W. Oliver, Western District of Missouri, 58 F.R.D. 270.[3]

A second potential restriction internal to 16(a), although not pressed by the Government here, is that disclosure is limited to statements either written or signed by the defendant or recorded verbatim. United States v. Garrett, 305 F. Supp. 267 (D.N.Y. 1969), rejected the ar-

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3. A corollary of the Government's third-party argument, which is not pressed here, is that pre-arrest or non-custodial statements are not discoverable. The distinction has been rejected. United States v. Leighton, 265 F. Supp. 27 (S.D. N.Y. 1967); United States v. Bryant, 142 U.S. App. D.C. 132, 439 F. 2d 642 (1971).

gument when made to avoid disclosure of an I.R.S. agent's report of a statement made by the defendant, the court reasoning that a statement was "recorded" within the meaning of Rule 16(a) when its content was memorialized in a report made after the fact. The *Garrett* rationale is consistent with the history of the meaning of recorded statements under Section 3500 and, in my judgment, is the preferred one. Otherwise we would lose sight of the purpose of 16(a) discovery: to disclose to the defendant what the Government intends to prove the defendant said, not how it intends to prove it.

In sum, it is my opinion that Rule 16(a) contemplates discretionary pre-trial disclosure of a defendant's statements to a non-agent of the Government (i.e., to "third parties") regardless of how the statement has been "recorded."

THE PROHIBITION OF SECTION 3500

18 U.S.C. § 3500 provides in material part:

> "(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the

subject matter as to which the witness has testified. . . ."

In recognition of the restrictions which Section 3500 imposes on pre-trial discovery of witness statements, Rule 16(b) provides that "[e]xcept as provided in subdivision (a)(2),[4] this rule does not authorize discovery or inspection . . . of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500."

The essence of the Government's argument here is that when a defendant's statement to a third party is incorporated into a statement made by the third party (or another), that portion of the person's statement which relates to the defendant's statement is not discoverable prior to trial because Section 3500 provides that no statement of a prospective witness is discoverable until the witness has testified. The defendant's statement is absorbed into the statement of the third party. Thus, the content and circumstances of the defendant's statement are not discoverable in advance of trial if the Government's knowledge of them was gained through information provided by a prospective witness whose statement is not discoverable until he testifies. Because I do not perceive those consequences to have been intended by either the language or purpose of Section 3500, I reject the Government's argument.

Statements of "the defendant" are excluded from the scope of the Act and under its express terms discovery of

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4. Clause (a)(2) relates to physical and mental examinations and experiments and is not applicable here.

such statements need not await trial. The Act reads, "no statement . . . in the possession of the United States which was made by a . . . witness . . . (other than the defendant) shall be the subject of . . . discovery . . . until said witness has testified on direct examination. . . ." 18 U.S.C. § 3500. The parenthetical exclusion of the defendant can only be regarded as a clear manifestation on the part of Congress that it did not intend Section 3500 to have any application to statements made by a defendant.

Furthermore, today the Act makes no distinction as to whom the statement was made. As originally enacted in 1957, the Act was limited to statements in the possession of the Government made by a prospective witness (other than that defendant) "to an agent of the Government." 18 U.S.C. § 3500. Statements made by a prospective witness "to an agent of the Government" were protected from pre-trial discovery; statements made by the defendant "to an agent of the Government" were not. In 1970, Congress deleted the language "to an agent of the Government." Pub. L. 91-452, Title I, § 102, Oct. 15, 1970, 84 Stat. 926; 18 U.S.C.A. § 3500 (pocket parts). As a consequence, statements in the possession of the Government made by a prospective witness (other than the defendant) are protected from pre-trial discovery, regardless of to whom the statements were made. By the same token, statements made by the defendant are subject to pre-trial discovery, regardless of to whom the statements were made.[5]

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5. The deletion was motivated by a Congressional desire to protect grand jury testimony from disclosure. The breadth of the language employed does more than that.

Had Congress intended to restrict pre-trial disclosure of a defendant's statements it readily could have found the language to do so. But that was not its purpose. As the Supreme Court observed in Palermo v. United States, 360 U.S. 343, 79 S. Ct. 1217, 3 L. Ed. 2d 1287 (1959), Congress was concerned with the gross unfairness of allowing "the defense to use statements to impeach a witness which could not fairly be said to be the *witness'* own. . . . The purpose of the Act, its fair reading and its overwhelming legislative history compel [the conclusion] . . . that *statements of a government witness* . . . which cannot be produced under the terms of 18 U.S.C. § 3500 . . . cannot be produced at all. . . . It is clear that Congress was concerned that only those *statements* which could properly be called *the witness' own words* should be made available to the defense for purposes of impeachment." (360 U.S. 343, 350, 351, 353, 79 S. Ct. 1217, 1223; emphasis supplied.) At no point in the Act, or in the Court's definitive interpretation of the Act, is pre-trial disclosure of a defendant's statement prohibited or deferred. It is the statements of prospective witnesses and those statements alone to which the Act is addressed.

But, the Government argues, unlike a tangible object, the statements of a defendant, the likes of which are here involved, do not have "palpable existence" separate and apart from the testimony of a prospective witness.[6] Thus, it is "manifestly impossible" to reveal the contents and

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6. Presumably the argument would not be made if the "statement" was written or signed by the defendant or was a sound recording of his voice. These would have a "palpable existence." Nonetheless, their use at trial would be dependent on authentication by a witness.

circumstances of a defendant's statement without revealing the contents of the prospective witness' statements which is forbidden by Section 3500. The rationale is engaging but not persuasive.

The statement remains that of the defendant irrespective of who witnesses, reports or memorializes it. It does not become the statement of the prospective witness merely because he repeats or reports it. Its probative vitality rests on the fact that it is the defendant's statement. Indeed, were I to adopt the Government's reasoning, it would follow that a defendant could not obtain disclosure of an in-custody oral confession made to an agent of the Government and thereafter memorialized in the agent's report because to do so would be to order discovery of the statement of a prospective witness, i.e., the agent's statement that the defendant had confessed.

As the Government has reminded: "We must think things not words, or at least we must constantly translate our words into facts for which they stand, if we are to keep the real and true." Holmes, *supra*. The "things" and "facts" here are that the Government will assert that a defendant made a statement. The overriding philosophy of pre-trial discovery in criminal cases is that the defendant is entitled to know the contents and circumstances of that statement. It may be that only through disclosure will the defendant recall it or be able to appraise its completeness or context. It may be that only through disclosure will defendant's counsel learn of it.[7] Certain it is that

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7. We should not lose sight of the teachings of experience that defendants do "forget" statements they have made and that one of the purposes of discovery is to assure the effective assistance of counsel. This need is particularly acute in the case of the defendant Kopple.

as to the defendant, his statement will have an existence apart from the contents of a prospective witness' statement.

I turn to the decisions applying the Act, upon which the Government relies. Most important is the Seventh Circuit's opinion in United States v. McMillen, 489 F. 2d 229 (No. 72-1648, Oct. 17, 1972).[8] There my colleague, Judge Thomas McMillen, on the motion of one defendant ordered the Government to produce "Statements made by any co-defendant . . . with whom defendant Siegel is . . . to be tried." Thereafter Judge McMillen ordered production of "[s]tatements of all defendants which mention Robert Siegel in connection with this case. . . ." The Government sought mandamus to compel vacation of the latter order. The Court of Appeals granted the writ because "Rule 16(b) and § 3500 prohibit a district judge from ordering production of statements of Government witnesses, whether or not they are co-defendants, before they have testified. Robert Buss is the only co-defendant named by the Government. . . . Accordingly the writ shall issue to deny defendants' access to Robert Buss' statements until he testifies at the trial."

McMillen does not speak to the disclosure I order here. My direction to the Government is that it disclose to the several defendants their own statements; not the statement of a prospective witness. I do not read *McMillen* as prohibiting that disclosure merely because the defendant's statement has been incorporated in the statement of a prospective witness.

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8. While unreported when rendered, I am advised that *McMillen* has been released by Chief Judge Swygert for publication.

More to the point is the decision of the Seventh Circuit in United States v. Sepulveda et al., 478 F. 2d 1406 (1973).[9] There, on appeal from their conviction, defendants complained of the trial court's refusal to order disclosure "of statements in the Government's possession made by third parties but repeating appellants' statements to such third parties." In addition to finding that the appellants were not prejudiced by the non-disclosure prior to trial, the court (per Mr. Justice Clark sitting by designation) said, "This Court has held that Rule 16(a) does not authorize the production of third party statements that relate a defendant's statements second hand [citing United States v. McMillen, supra]." With all respect, that is not what *McMillen* involved unless, by his statement, Mr. Justice Clark meant that incorporation of a statement attributed to a defendant does not warrant disclosure of the entire statement of the prospective witness. If that be the holding of *Sepulveda* I am in accord. As my orders herein make clear, the Government need not display any part of a particular prospective witness' statement. All that it need do is disclose to the defendant the statements attributable to him which the Government intends to use at trial, and the persons to whom and the date upon which the statements were made.

Nor does the Second Circuit's recent decision in United States v. Percevault, 490 F. 2d 126 (1974), reject disclosure of the nature here ordered. There the district court ordered pre-trial disclosure of statements of alleged co-

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9. Under the Seventh Circuit's Rule 28, *Sepulveda* has no precedential value and should not be cited. The administration of justice will be furthered if counsel will honor the Rule.

conspirators on the theory that they would be admissible at trial against the defendant as his vicarious admissions, 61 F.R.D. 338. The Government refused to make disclosure of "written or oral statements or confessions made after the conspiracy terminated by co-conspirators, including co-defendants, whom the Government intends to call as witnesses at the trial. . . ." On appeal pursuant to 18 U.S.C. § 3731, the district court having announced that it would exclude the undisclosed statements, the court of appeals reversed. It rejected the district court's vicarious admissions rationale[10] and, having done so, regarded the situation as akin to United States v. McMillen, *supra*, which indeed it was. Thus, *Percevault*, like *McMillen*, did not involve statements made by the defendant.

United States v. Wilkerson, 456 F. 2d 57, 61 (6th Cir. 1972), comes closer on the facts. There, as in *Sepulveda*, appeal following conviction was based, in part, on the trial court's refusal to order disclosure of a "confession" made by the accused to a person not an agent of the Government. In affirming, the court of appeals merely observed, "the defendant's right to challenge the witness is adequately protected by the Jencks Act. Moreover, we believe that the language of both Rule 16(a) and the Jencks Act indicates that the focus of this discovery rule is on direct communications between a witness and the Government." It appears to me that the real thrust of *Wilkerson* is that the "focus" of Rule 16(a) and Section 3500 is on statements made by the defendant directly to the Government. For the reasons stated in my discussion

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10. It would appear that such post-termination statements would not be admissible against the defendant on trial as his vicarious admissions.

of the scope of the Rules, I do not agree with that interpretation of Rule 16(a).

Finally, there is United States v. Dorfman, 53 F.R.D. 477 (S.D. N.Y. 1971). There the court concluded, as the Government here urges, that statements made by a defendant which are incorporated into a statement of a prospective witness are not discoverable under Section 3500. My reading of *Dorfman* suggests that the court did not consider Section 3500's express exception of statements made by the defendant and, accordingly, I decline to follow it.

It is my considered judgment that none of the decisions relied upon by the Government compel me to deny disclosure of a defendant's statements to third parties.

There does remain one final consideration. Rule 16(b) provides that the rule "does not authorize the discovery . . . of statements made by . . . prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500." Thus the phrase "to agents of the Government" remains in the Rule although it has been deleted from Section 3500. Assuming that the language has significance apart from its origin in Section 3500, it has no effect here for our concern is with statements of the defendants which are discoverable in advance of trial under the express terms of Rule 16(a) and Section 3500.

For the foregoing reasons the motions of the Government for reconsideration in 73 CR 370, 73 CR 646 and 74 CR 22 will be Denied and the defendant's motion for discovery in 73 CR 778 will be Granted. Appropriate orders will be entered in each case. To facilitate review of these orders pursuant to 18 U.S.C. § 3741, I state that

I will exclude from evidence and deny the Government the right to use at trial any statements made by the several defendants which are not disclosed pursuant to the views expressed herein.

APPENDIX "D"

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3500

DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United

States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3731

APPEAL BY UNITED STATES

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court's suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.

The provisions of this section shall be liberally construed to effectuate its purposes.

As amended May 24, 1949, ch. 139, § 58, 63 Stat. 97; June 19, 1968, Pub. L. 90-351, Title VIII, § 1301, 82 Stat. 237; Jan. 2, 1971, Pub. L. 91-644, Title III, § 14(a), 84 Stat. 1890.

FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 7(f)

Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

RULE 16
DISCOVERY AND INSPECTION

(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the

exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

(b) Other Books, Papers, Documents, Tangible Objects or Places. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a) (2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-577

BERNARD FEINBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that 18 U.S.C. 3500 does not bar pretrial discovery, under Rule 16, Fed. R. Crim. P., of statements made by him to a prospective government witness during the course of commission of an alleged offense, which were not memorialized in any manner but the witness's recollection.

1. On May 9, 1973, petitioner was charged in a nine count indictment with violating 18 U.S.C. 1341.[1] Prior to trial, petitioner filed a motion for a bill of particulars pursuant to Rule 7, Fed. R. Crim. P., in which he sought dis-

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[1]The indictment charged petitioner with devising a scheme to defraud the citizens of Cook County, Illinois, of duly owed taxes by misrepresenting that developed, income-producing lands that he owned were vacant. The individual mailings upon which each count of the indictment is based, primarily representing items designed to facilitate the misrepresentations, are alleged to have been caused by defendant to be mailed in furtherance of the scheme.

covery of, among other things, any of his oral statements that the government intended to introduce at trial, the name and address of the person to whom it was made, and the date of its utterance. The request for particularization was granted, and the government's motion for reconsideration was denied in a brief memorandum opinion.[2] The government then requested that the district court further reconsider its decision on the ground that its discovery order was precluded by the express language of 18 U.S.C. 3500. On March 1, 1974, the district court denied the motion to reconsider and, treating petitioner's request as one for discovery under Rule 16(a), Fed. R. Crim. P., held that, regardless of whether the procedural vehicle for seeking discovery is Rule 16(a) or Rule 7(f), a defendant is entitled to discover statements that he is alleged to have made to prospective government witnesses during the course of commission of the offense. See 371 F. Supp. 1205 (N.D. Ill.); Pet. App. C.

The government refused to comply with the discovery order, and the district court thereupon ordered the suppression of testimony of prospective government witnesses with regard to statements made to them by petitioner during the course of the alleged offense. The government appealed pursuant to 18 U.S.C. 3731.[3] The court of appeals

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[2]The district court's initial opinion was not published, and it was subsequently superseded by the March 1, 1974 opinion (Pet. App. C).

[3]The district court's order involved four pending cases; appeal was taken by the government in two of those cases: C.A. No. 74-1253, *United States* v. *Bernard Feinberg* (petitioner), and C.A. No. 74-1254, *United States* v. *John C. Thompson.*

affirmed in part[4] but reversed the suppression order insofar as it was based upon the government's failure to furnish petitioner with the substance of his statements to prospective government witnesses. (Pet. App. A).

2. Petitioner's contention that 18 U.S.C. 3500 is not a bar to the discovery, pursuant to Rule 16, of his statements made to prospective government witnesses during the course of an alleged offense was properly rejected by the court of appeals in a comprehensive opinion upon which we rely. As the court below stated (Pet. App. 3A-5A):

> In pertinent part, Rule 16(a)(1) permits the district court to order the Government to permit a defendant to inspect and copy or photograph any relevant "written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government * * *." The Advisory Committee's notes make it plain that the words "to the attorney for the government" modify the phrase "the existence of which is known or by the exercise of due diligence may become known." 8 Moore's Federal Practice, par. 16.01[3] p. 16-5 (2d ed. 1973). Therefore, as held below (371 F. Supp. at 1216), Rule 16(a)(1) is not limited to statements of the defendant made to agents of the Government. *United States* v. *Baker*, 262 F. Supp. 657, 671-672 (D. D.C. 1966); Moore, *supra*, par. 16.01[1] p. 16-38.

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[4]The court affirmed that part of the order that held that a defendant may discover whether a written record of the statements exist, the identity of persons to whom the statements were allegedly made and the date on which they were allegedly made (Pet. App. 2A). These aspects of the district court's order were not directly challenged on the government's appeal (*id.* at 2A-3A).

On the other hand, Rule 16(b) provides in pertinent part that Rule 16 does not authorize the discovery or inspection "of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in" the Jencks Act. Accordingly, it is necessary to refer to the Jencks Act to see if it permits the discovery of defendants' statements made to prospective government witnesses (371 F. Supp. at 1212).

In pertinent part, the Jencks Act provides (18 U.S.C. §3500(a)):

> "In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case."

While we sympathize with broadened discovery in criminal cases, the foregoing statutory provision prescribes [sic][5] pre-trial discovery of statements of government witnesses, including those parts which relate conversations of the defendant. Such statements are not producible under 18 U.S.C. §3500(b) until after a witness called by the United States has testified on a subject matter related to the statements. *United*

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[5]Presumably, the court intended to say "proscribes."

States v. *Wilkerson*, 456 F.2d 57, 61 (6th Cir. 1972), cert. den., 408 U.S. 926; *United States* v. *Kenny*, 462 F.2d 1205, 1212 (3d Cir. 1972), cert. den. *sub nom. Krupke* v. *United States*, 409 U.S. 914; *United States* v. *Dorfman*, 53 F.R.D. 477, 479 (S.D. N.Y. 1971), affirmed, 470 F.2d 246 (2d Cir. 1972).* * *

As noted in *Dorfman*, in excluding pre-trial discovery of oral statements made by defendant to prospective government witnesses, Congress was endeavoring to protect the security of those witnesses. Prohibiting the disclosure ordered here until the witness has testified at trial also protects the integrity of the Government's evidence. Probably these same factors motivated the draftsmen of proposed Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure (presently scheduled to go into effect on August 1, 1975) to limit pre-trial discovery to the "substance of any oral statement which the government intends to offer in evidence at the trial *made by the defendant* whether before or after arrest in response to interrogation by any person then known to the defendant *to be a government agent*" (emphasis supplied) (62 F.R.D. 304-305). Since the proposed rule was intended to give "greater discovery" than before (62 F.R.D. 308), it strongly reinforces our holding that the present rule does not permit the discovery sought.

Petitioner's contentions that he does not seek to discover the statement of a government witness (Pet. 9-11) and that discovery will not affect the integrity of the government's evidence (Pet. 12) are without merit. The fact that a witness's statement may refer to remarks allegedly made by a defendant does not remove that statement from the scope of the Jencks Act. *United States* v.

McMillen, 489 F.2d 229 (C.A. 7); cf. *United States* v. *Percevault*, 490 F.2d 126 (C.A. 2). And as the court of appeals stated (Pet. App. 6A): "* * * ordinarily 'it is "manifestly impossible" to reveal the contents and circumstances of a defendant's statement without revealing the contents of the prospective witness' statement which is forbidden by Section 3500.'"

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.